Hassan bin Kadir & Ors v Mohamed Moidu bin Mohamed & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–11 OF 2010(J)
ARIFIN ZAKARIA CJ (MALAYA), ZULKEFLI AND JAMES FOONG FCJJ
12 APRIL 2011

Land Law — Sale of land — Contract for sale — Whether contract or deed of sale of land was 'dealing' or 'instrument of dealing' under the National Land Code ('the NLC') — Whether deed of sale of portion (less than 2/5 of hectare) of agricultural land was prohibited by s 205(3) of the NLC — Whether NLC had no provision that enabled court to direct the Registrar of Land Titles ('Registrar') to endorse existence of constructive trust on document of title — Whether more appropriate method was to direct the Registrar to lodge registrar's caveat against land to protect interests of beneficiaries under trust

Pursuant to a deed of sale ('the deed') and irrevocable power of attorney ('the PA') executed in 1978, the respondents bought 21,000 sqft ('the said portion') in a plot of agricultural land owned by the appellants' late father ('the deceased') and paid the full purchase price for it and entered into possession of the said portion. When the deceased died and the land (including the said portion) was registered in the names of the appellants as beneficiaries of the deceased's estate, the respondents requested for the said portion to be transferred to them but the request was not entertained. The respondents sued the appellants for, inter alia, specific performance of the deed and an order that they be made co-owners of the land; alternatively, the respondents sought a declaration that the appellants held the said portion on trust for them pending registration of the said portion in the respondents' favour. The High Court granted the reliefs sought by the respondents and ordered the Registrar of Land Titles/land administrator to endorse on the register document of title to the land a memorial that the appellants held the said portion on constructive trust for the respondents. With regard to the appellants' argument that s 205(3) and (4) of the National Land Code ('the NLC') barred the respondents from being made co-proprietors of the land, the High Court held that the respondents' equitable interests in the said portion were protected and enforceable by way of the trust. In dismissing the appellant's appeal against the trial court's decision, the Court of Appeal ('COA') held that the deed was not invalidated by s 205(3) of the NLC (which prohibited any dealing in agricultural land that had the effect of creating an undivided share in the land which was less than 2/5 of a hectare) because the deed was executed well before s 205(3) came into force and that that section did not have retrospective effect. The appellants obtained leave to appeal to the

A Federal Court against the COA's decision on the question whether the deed and the PA were instruments of dealing within the meaning of s 205 read with s 5 and ss 206 to 211 of the NLC and, if they were not, whether the prohibition in s 205(3) of the NLC applied to the deed and the PA.

B **Held**, dismissing the appeal and varying the order of the High Court (as affirmed by the COA) to include a direction to the Registrar of Land Titles to enter a registrar's caveat against the land to state that the appellants as registered proprietors of the land held 21,000/84398 undivided shares in the land as constructive trustees for the respondents, their successors in title or assigns:

C

(1) Under s 205(1) of the NLC, 'dealings' that were capable of being effected under the NLC in respect of alienated lands and interests therein were only those specified in Parts 14–17 of the NLC and no others. Thus, the term 'dealing' referred to transactions in land where the provisions of the
D NLC had been observed as to form and the necessary stamp duty had been paid, and followed by registration thereof on the register. By contrast, a contract or deed of sale of land was a transaction entered into without compliance with the requirements of the NLC both in respect of substance and form. The contract or deed was not in any way regulated
E by the Code although an interest arising under the contract or deed might be protected by way of entry of private caveat. The deed of sale in the present case, therefore, did not fall within the meaning of the word 'dealing' as defined in s 5 of the NLC. It was also not an 'instrument of
F dealing' within the meaning of the provisions of s 205 read together with ss 206–211 of the NLC. It therefore followed that the prohibition in s 205(3) of the NLC did not apply to the deed of sale (see paras 17–18).

(2) In the present case, a constructive trust came into existence upon the execution of the deed of sale. This was in line with the common law
G principle that the deed of sale entitled the respondent to specific performance and this, in turn, activated the equitable principle that equity looked upon as done, that which ought to have been done. Equity dictated that the appellants held the said portion subject to a constructive trust in favour of the respondents pursuant to the terms of the deed of sale
H (see paras 27–28).

(3) There was no provision under the NLC for registration of the constructive trust to protect the beneficiaries thereunder. It was more appropriate to direct the Registrar of Land Titles to enter a registrar's
I caveat against the land to protect the interests of the respondents as beneficiaries under the constructive trust. Accordingly, the order of the High Court, as affirmed by the Court of Appeal, was varied to include such a direction (see paras 30–31).

[Bahasa Malaysia summary

Berikutan surat ikatan jualan ('surat ikatan') dan surat kuasa wakil yang tidak boleh dibatalkan ('SKW') yang disempurnakan pada tahun 1978, responden-responden membeli 21,000 kaki persegi ('bahagian tersebut') dalam bahagian tanah pertanian yang dimiliki oleh arwah bapa perayu-perayu ('si mati') dan membayar harga belian penuh dan memasuki ke dalam milikan bahagian tersebut. Apabila si mati meninggal dunia dan tanah tersebut (termasuk bahagian tersebut) didaftarkan atas nama perayu-perayu sebagai benefisiari estet si mati, responden-responden memohon untuk bahagian tersebut dipindahkan kepada mereka tetapi permohonan tersebut tidak dilayan. Responden-responden menyaman perayu-perayu untuk, antara lain, pelaksanaan spesifik surat ikatan dan perintah yang mereka dibuat pemilik bersama tanah tersebut, secara alternatif, responden-responden memohon perisytiharan bahawa perayu-perayu memegang bahagian tersebut atas amanah bagi pihak mereka sementara menunggu pendaftaran bahagian tersebut dalam memihak responden-responden. Mahkamah Tinggi membenarkan relief-relief yang dipohon oleh responden-responden dan memerintah Pendaftar Hakmilik Tanah/pentadbir tanah untuk mengendors ke atas dokumen berdaftar hakmilik kepada tanah rekod bahawa perayu-perayu memegang bahagian tersebut atas amanah konstruktif bagi responden-responden. Berkaitan hujahan perayu-perayu bahawa s 205(3) dan (4) Kanun Tanah Negara ('KTN') menghalang responden-responden daripada dibuat sebagai pemilik bersama tanah tersebut, Mahkamah Tinggi memutuskan bahawa kepentingan ekuiti responden-responden dalam bahagian tersebut dilindungi dan dikuatkuasakan melalui amanah. Dalam menolak rayuan perayu-perayu terhadap keputusan mahkamah perbicaraan, Mahkamah Rayuan ('MR') memutuskan bahawa surat ikatan tidak dibatalkan oleh s 205(3) KTN (yang melarang apa-apa urusniaga dalam tanah pertanian yang mempunyai kesan membentuk syer yang tidak dibahagikan dalam tanah tersebut yang mana adalah kurang daripada 2/5 hektar) kerana surat ikatan tersebut disempurnakan sebelum s 205(3) berkuat kuasa dan bahawa seksyen tersebut tidak mempunyai kesan retrospektif. Perayu-perayu memperolehi izin untuk merayu kepada Mahkamah Persekutuan terhadap keputusan MR atas soalan sama ada surat ikatan tersebut dan SKW adalah instrumen urusniaga dalam maksud s 205 dibaca bersama dengan s 5 dan ss 206–211 KTN dan, jika ia tidak, sama ada larangan dalam s 205(3) KTN diguna pakai kepada surat ikatan dan SKW.

Diputuskan, menolak rayuan dan mempelbagaikan perintah Mahkamah Tinggi (seperti disahkan oleh MR) untuk memasukkan arahan kepada Pendaftar Hakmilik Tanah untuk memasukkan kaveat pendaftar terhadap tanah untuk menyatakan bahawa perayu-perayu sebagai pemilik-pemilik tanah memegang 21,000/84,398 syer yang tidak dibahagi dalam tanah sebagai pemegang amanah konstruktif responden-responden, pengganti mereka

dalam hakmilik atau pemegang serah hak:

(1) Di bawah s 205(1) KTN, 'dealings' yang boleh dijejaskan di bawah KTN berkaitan tanah diberi milik dan kepentingan di dalamnya hanya yang dinyatakan dalam Bahagian 14–17 KTN dan bukan yang lain. Oleh itu, terma 'dealing' merujuk kepada transaksi tanah di mana peruntukan KTN telah diambil kira terhadap borang dan duti stem yang perlu telah dibayar, dan diikuti oleh pendaftarannya dalam daftar. Berbanding, kontrak atau surat ikatan jualan adalah transaksi yang dimasukkan tanpa mematuhi kehendak-kehendak KTN yang kedua-duanya berkaitan isi dan borang. Kontrak atau surat ikatan bukan dalam mana-mana cara dikawal oleh Kanun walaupun kepentingan berbangkit di bawah kontrak atau surat ikatan mungkin dilindungi melalui kemasukan kaveat persendirian. Surat ikatan jualan dalam kes ini, oleh itu, tidak terangkum dalam maksud perkataan 'dealing' seperti yang dimaksudkan dalam s 5 KTN. Ia juga bukan 'instrument of dealing' dalam maksud peruntukan s 205 dibaca bersama dengan ss 206–211 KTN. Ia oleh itu diikuti bahawa larangan dalam s 205(3) KTN tidak diguna pakai kepada surat ikatan jualan (lihat perenggan 17–18).

(2) Dalam kes ini, amanah konstruktif wujud atas penyempurnaan surat ikatan jualan. Ini adalah selaras dengan prinsip common law bahawa surat ikatan jualan membuatkan responden berhak kepada pelaksanaan spesifik dan ini, sebaliknya, mengaktifkan prinsip ekuiti bahawa ekuiti dilihat seperti dilakukan, yang mana sepatutnya dilakukan. Ekuiti menentukan bahawa perayu-perayu memegang bahagian tersebut tertakluk kepada amanah konstruktif memihak responden-responden berikutan terma-terma surat ikatan jualan tersebut (lihat perenggan 27–28).

(3) Tidak terdapat peruntukan di bawah KTN untuk pendaftaran amanah konstruktif melindungi benefisiari-benefisiari di bawahnya. Ia adalah wajar untuk mengarahkan Pendaftar Hakmilik Tanah untuk memasukkan kaveat pendaftar terhadap tanah bagi melindungi kepentingan responden-responden sebagai benefisiari-benefisiari di bawah amanah konstruktif. Dengan itu, perintah Mahkamah Tinggi, seperti yang disahkan oleh Mahkamah Rayuan, adalah dipelbagaikan untuk memasukkan arahan sedemikian (lihat perenggan 30–31).]

Notes

For cases on contract for sale, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5112–5113.

Cases referred to

Attorney-General For Hong Kong v Charles Warwick Reid and Others [1994] 1 AC 324, PC (refd)

Beatty v Guggenheim Exploration Co (1919) 225 NY 380, CA (refd)
Carl Zeiss Stiftung v Herbert Smith & Co And Another (No 2) [1969] 2 Ch 276, CA (refd)
Hugh Thomas Miller v Minister of Mines and the Attorney-General of New Zealand [1963] AC 484, PC (refd)
Itam binti Saad v Chik binti Abdullah [1974] 2 MLJ 53 (refd)
Kersah La'usin v Sikin Menan [1966] 2 MLJ 20 (refd)
Letchumanan v Eng Mee Yong & Ors [1977] 1 MLJ 7, FC (refd)
Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449, SC (refd)
Macon Engineers Sdn Bhd v Goh Hooi Yin [1976] 2 MLJ 53, FC (refd)
Munah v Fatimah [1968] 1 MLJ 54 (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2) [2010] 2 MLJ 181; [2010] 1 CLJ 419, FC (refd)
Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors [1974] 2 MLJ 45, FC (refd)
United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors [1976] 1 MLJ 169, FC (refd)
Walsh v Lonsdale (1882) 21 Ch D 9, Ch D (refd)
Yeoman's Row Management Ltd and another v Cobbe [2008] UKHL 55, HL (refd)

Legislation referred to

Civil Law Act 1956 s 3
National Land Code ss 5, 136, 205, 205(1), (3), 206, 207, 208, 209, 210, 211, 324(2), 417, Parts 14, 15, 16, 17

Appeal from: Civil Appeal No J-02–729 of 2002 (Court of Appeal, Putrajaya)

Wong Kim Fatt (Mathews George with him) (Mathews George & Co) for the appellants.
Robert Lai Poh Fye (Fadzilah Mansor with him) (Jackson & Masacorale) for the respondents.

Arifin Zakaria CJ (Malaya) (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellants against the decision of the Court of Appeal dated 1 September 2009 dismissing the appellants' appeal. Leave to appeal was granted by this court on 19 July 2010 on the following question:

> Whether the Deed of Sale and Irrevocable Power of Attorney, executed prior to the commencement of section 205 of the National Land Code 1965, is an instrument of dealing in respect of an alienated land, within the provisions of section 205, of the National Land Code 1965, read with sections 5 and 206 to 211 thereof; and if it is

A not an instrument of dealing, whether the prohibition in section 205(3) applies to the Deed of Sale and Irrevocable Power of Attorney.

In this judgment, the respondents will be referred to as the plaintiffs and the appellants as the defendants as in the trial court.

B

THE FACTS

[2] The facts relevant to this appeal are briefly as follows:

By the deed of sale and Irrevocable Power of Attorney dated 7 October 1978 ('the C Deed of Sale'), the plaintiffs purchased from the defendants' late father ('the deceased') 21,000 square feet ('the said portion') in the land comprised in GM 482 (previously known as EMR 381) Lot 261, Mukim Plentong, Daerah Johor Bharu, Negeri Johor ('the said land'). The said land is subject to the category 'agriculture'. The plaintiffs paid the full purchase price of RM42,000.00 and entered into D possession of the said portion of the land.

[3] The deceased passed away on 17 November 1978. The defendants then obtained a distribution order as beneficiaries of their late father's estate, where the said land, including the said portion, was transmitted to the defendants as E registered proprietors in equal shares.

[4] The plaintiffs then requested the defendants to transfer the said portion to them but the defendants refused.

F

[5] The plaintiffs then lodged a private caveat on the said land. The plaintiffs' application to the Johor Bahru Land Administrator to vary the distribution order was rejected.

THE HIGH COURT

G

[6] The plaintiffs filed an originating summons in the Johor Bharu High Court against the defendants but withdrew it with liberty to file afresh.

H **[7]** Subsequently, the plaintiffs filed a writ of summons against the defendants praying for, inter alia:

(a) specific performance of the deed;

(b) transfer of said portion of the subject land to the plaintiffs pursuant to I the said deed and for the plaintiffs to be made co-owners of the subject land;

(c) alternatively, a declaration that the plaintiffs are entitled to the said land portion under the deed and the defendants as trustees transfer the same to the plaintiffs and be made registered co-owners of the land, failing

which the senior assistant registrar shall execute the transfer of the said portion to the plaintiffs and that the Registrar of Titles be directed to register the same in favour of the plaintiffs;

(d) such further relief that the High Court deems fit and equitable in the circumstances of the case; and

(e) costs.

[8] At the end of the trial, the learned trial judge found for the plaintiffs and made the following orders:

(a) that the defendants do hold the subject land comprised in GM482 (previously known as EMR381) Lot 261 Mukim Pletong, Daerah Johor Bharu, Negeri Johor subject to the constructive trust created in favour of the plaintiffs to the extent of 21,000 sqft thereof pursuant to the deed of sale and irrevocable power of attorney dated 7 October 1978; and

(b) that pursuant to s 417 of the NLC, the Registrar of Titles or the land administrator, as the case may be, do cause an endorsement to be entered on the register document of title of the trust aforesaid in favour of the plaintiffs herein.

[9] In relation to the issue of whether there is a binding agreement upon the terms of the deed of sale, the learned trial judge in his judgment held:

> Upon a careful analysis of the terms of the agreement as expressed therein I have no hesitation in concluding that it was an out and out agreement for sale of the portion. The recitals in the preamble identifies the land, the portion and the sale consideration of RM42,000. The deed of sale then goes on to expressly state that 'in consideration of the sum of RM42,000.00 (Dollars Forty Two Thousand) only the receipt whereof the Vendor hereby acknowledges in full being the agreed purchase price of the aforesaid premises, the vendor do hereby transfer, assign and convey all his rights, title and interest in the said portion of the property free from all encumbrances TO HOLD the same unto the Purchasers absolutely'.

[10] As to the question whether the deed of sale was unenforceable and illegal being in contravention of ss 205 and 136 of the National Land Code ('the Code'), the learned judge held:

> It is my judgment that the sum total of the prohibitory provisions of s 205(3) and 205(4) would have the effect of prohibiting the plaintiffs from the relief sought of effecting registration of themselves as co-proprietors of the land herein which is categorided as agricultural land. This brings me to the question as to what is the effect of the prohibitory provision of s 205 of the National Land Code on the deed of sale — does it mean that the statutory bar in getting themselves registered as co-proprietors would leave the plaintiffs herein without any remedy whatsoever? Does the rigours of s 205 of the National Land Code prevent this court from giving effect and preserving the equitable interest of the plaintiffs? In my judgment the

interest of justice dictates that the court should and must come to the aid of the plaintiffs herein more so in the light of the findings of the equitable interests by way of trusts created and subsisting under the deed of sale.

THE COURT OF APPEAL

[11] On appeal, the Court of Appeal narrowed down the issue in the appeal to this:

> Does s 205(3) of the National Land Code 1965, read with s 205(4) and 205(5), prohibit the High Court from making the above orders?

[12] At the end of the hearing of the appeal, the Court of Appeal dismissed the defendants' appeal with costs. The underlying reasons for their decision are found in the following passage of their judgment:

> The amendment in s 205(3) was inserted vide s 77 of Act A587/1984 to prohibit the holding of agricultural land by co- owners where the area of the individual portions is less than two- fifths of a hectare: see *National Land Code — A Commentary* by Judith Sihombing at p 379 (1992). However, as alluded to above, s 205(3) is to be read subject to sub-ss (4) and (5). The amendment in s 205(5) was effected by s 24 of Act A625 (sic)/1985 which came into force on 25 March 1985. The Deed in the instant appeal was executed on 7 October 1978, some six seven years before the enactment s 205(3) as modified by s 205(5). It is therefore axiomatic that s 205(3) is inapplicable. Instead, s 205(5) prevails and the Deed is not rendered invalid by s 205(3). The effect of introducing s 205(5) is to preclude the retrospective effect of s 205(3) on certain instruments. In the circumstances of this appeal, s 205(5) prevails. Hence the deed is not rendered invalid by s 205(3).

THIS COURT

[13] This court had on 19 July 2010 granted leave to the defendants to appeal against the decision of the Court of Appeal on the question of law set out earlier.

THE QUESTION

[14] The question posed to us may be divided into two parts namely:

(i) whether the deed of sale executed prior to commencement of s 205 of the Code (as amended) is an instrument of dealing within the meaning of s 205 read with ss 5 and 206–211 of the Code? and

(ii) if the answer to (i) is in the negative, whether the prohibition in s 205(3) applied to the deed of sale?

[15] For ease of reference, the relevant part of the s 205 of the Code is reproduced below:

205 Dealings capable of being effected, and persons capable of taking thereunder.

(1) The dealings capable of being affected under this Act with respect to alienated lands and interests therein shall be those specified in Parts Fourteen to Seventeen, and no others.

(2) The persons and bodies in whose favour such dealings are capable of being effected shall be those, to whom, under section 43, State land is capable of being alienated.

(3) Subject to sub-section (4), no dealing in respect of any alienated land subject to the category 'agriculture' or to any condition requiring its use for any agricultural purpose shall be effected if such dealing would have the effect of creating any undivided share of such size that, if the land is to be partitioned in proportion to the several shares, the area of any resulting individual portion would be less than two-fifths of a hectare.

(4) The prohibition imposed by sub-section (3) shall not apply to those cases where upon the coming into force of the said subsection, any alienated land or held by any person or body, is less than two-fifths of a hectare, or an undivided share in any alienated land held by any person or body represents a portion of less than two-fifths of a hectare, and dealings shall be capable of being effected in respect of such alienated land or undivided share therein:

Provided that —

(i) any such dealing shall be in respect of the whole of the alienated land and shall be in favour of only one person or body; or

(ii) any such dealing shall be in respect of the whole of any undivided share in any alienated land and shall be in favour of only one person or body, or one or more co-proprietors of the said land.

(5) Nothing contained in sub-section (3) and (4) shall render invalid any instrument effecting any dealing in any alienated land or any undivided share therein executed under this part before the commencement of this section.

[16] A dealing is defined in s 5 of the Code as follows:

5 Interpretation.

'dealing' means any transaction with respect to alienated; and effected under the powers conferred by Division IV, and any like transaction effected under the provisions of any previous land law, but does not include any caveat or prohibitory order;

[17] Under s 205(1) of the Code, 'dealing' that is capable of being effected under the Code in respect of alienated lands and interest therein shall be those specified in Parts 14–17 of the Code, and no others. Thus, the term 'dealing' refers to transaction in land where the provision of the Code has been observed as to form and the necessary stamp duty has been paid, and followed by

registration thereof on the register. In practice, to protect the interest of the purchaser, before the registration is effected, a caveat may be entered (see *Hugh Thomas Miller v Minister of Mines and the Attorney-General of New Zealand* [1963] AC 484; *United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors* [1976] 1 MLJ 169; *Letchumanan v Eng Mee Yong & Ors* [1977] 1 MLJ 7 and *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53).

[18] By contrast, a contract or deed of sale of land is a transaction entered into without compliance with the requirements of the Code both in respect of substance and form. The contract or deed is not in any way regulated by the Code. But, the interest arising under the contract or deed may be protected by way of private caveat entered into under s 324(2) of the Code. Premised on the above, I am of the view that the deed of sale in the present case does not fall within the meaning of the word 'dealing' as defined in s 5 of the Code. And it is not 'an instrument of dealing' within the provision of s 205 of the Code read together with ss 206–211 thereof. I would, therefore, answer the first part of the question in the negative. Since our answer to the first part of the question is in the negative, then it necessarily follows that the prohibition in s 205(3) of the Code does not apply to the deed of sale. That is our answer to the second part of the question.

[19] That is not, however, the end of the matter. There is one other issue, that is, whether the order made by the courts below is correct and appropriate in the light of the circumstances obtaining in this case.

[20] The deed of sale in the present case was entered into by the deceased and the plaintiffs in 1978. Clause 2 of the agreement provides that the purchasers, upon payment of the stipulated sum, shall have possession and occupation of the property and shall be at liberty to the use of the same, in any manner they choose and deem fit, and to execute all rights of exclusive ownership of the said portion of the property. And under cl 3, the vendor is to surrender to the purchaser the said portion forthwith.

[21] Pursuant to the deed of sale, the plaintiffs entered into occupation of the land and had been in occupation until today. But no transfer was effected in respect of the said portion. In other words, the plaintiffs were never registered as co-proprietors of the said land.

[22] By this writ, plaintiffs applied for specific performance of the said deed of sale. The learned High Court judge, having considered the evidence before him came to a finding that there was in fact a valid and binding agreement between the plaintiffs and the deceased. And since the plaintiffs had been in possession of the said portion, they did not lose their right by not proceeding at once for specific performance. The learned judge relied on *Kersah La'usin v*

Sikin Menan [1966] 2 MLJ 20; *Itam binti Saad v Chik binti Abdullah* [1974] 2 MLJ 53; *Munah v Fatimah* [1968] 1 MLJ 54 in support of his decision.

[23] The learned judge further held that the plaintiffs pursuant to the deed of sale had acquired rights ad rem over the said portion pending registration of the said portion by the vendor and by devolution, the defendants hold the said portion as constructive trustee for the plaintiffs.

[24] It is trite that the modified form of the Torrens System of registration of titles relating to alienated land as applied under the Code does not prevent the creation of beneficial interest in land whether under 'express trust', 'constructive trust' or 'resulting trust' arising out of the operation of law. This is derived from the rules of equity which is applicable in this country by virtue of the s 3 of the Civil Law Act 1956. And as was said by Syed Agil Barakbah SCJ in *Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449:

> The Code restricts the kinds of interests in land which are capable of being registered, but at the same time it does not prevent or restrict the creation of beneficial interests in land by way of equitable trust ... Prior to the registration of the title, the statutory form of transfer under the Code gives a title in equity to the purchaser until registration. The vendor is said to hold his proprietary interest as constructive trustee.

This case was cited by the learned judge in his judgment.

[25] The concept of constructive trust was applied by the Federal Court in the recent case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2)* [2010] 2 MLJ 181; [2010] 1 CLJ 419. In that case, Gopal Sri Ram FCJ quoted from the speech of Lord Scott of Foscote in *Yeoman's Row Management Ltd and another v Cobbe* [2008] UKHL 55, as to what is meant by constructive trust, which reads:

> It is impossible to prescribe exhaustively the circumstances sufficient to create a constructive trust but it is possible to recognise particular factual circumstances that will do so and also to recognize other factual circumstances that will not. A particular situation where a constructive trust has been held to have been created arises out of joint venture which involves the acquisition of an identified piece of land and a subsequent exploitation of, or dealing with, the land for the purposes of joint venture, and one of the joint ventures, with the agreement of the others who believe him to be acting for their joint purposes, makes the acquisitions in his own name but subsequently seeks to retain the land for his own purpose, the court will regard him as holding the land on trust for the joint ventures. This would be either an implied trust of a constructive trust arising from the circumstances and if, as would be likely from the facts as described, the joint ventures have not agreed and cannot agree about what is to be done with the land, the land would have to be

re-sold and, after discharging the expenses of its purchase and any other necessary expenses of the abortive joint venture, the net proceeds of the sale divided equally between the joint ventures.

[26] In *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45, Ong Hock Sim FJ, in delivering the judgment of the court, cited with approval a number of leading English authorities on the concept of bare trust which are relevant for the present purpose:

As was said by Jessel MR in *Lysaght v Edwards* [1876] 2 Ch D 499 at p 506:

> ... the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.

I would quote first the head note to *Williams v Greatrex* [1957] 1 WLR 31 at p 36:

> Held, (3) That the purchaser, having paid the deposits on and having entered into possession of the land, became the equitable owner of the land under a contract binding on the vendor such that the vendor could not now object to specific performance on the ground of laches unless he could show that he had not acquiesced in the purchaser's acts of possession or that the purchaser had abandoned the contract; and that the evidence showed sufficient acquiescence by him and no abandonment by the purchaser. Accordingly, despite the lapse of time, the purchaser was entitled to specific performance on payment of the balance of the price and interest thereon for the intervening years.

Denning LJ said in that case:

> If he wished to exclude the purchaser, he ought to have taken possession himself. He never did so. I am quite clearly of opinion that, as long as the purchaser remained in possession under a contract which entitled him to be there, he had an equity which the courts will protect. There was no need for him to claim specific performance in order to give him a right to be there. Laches or delay is not a bar to this action.

In a concurring judgment Hodson LJ (as he then was) cited with approval Cotton LJ in *Mills v Haywood* [1877] 6 Ch D 196 2023 where His Lordship said:

> In such a case, as, eg, where the purchaser in possession has no right or title to such possession except as purchaser, his possession is an assertion on his part of his right under the contract of purchase, and acquiescence in his possession is a recognition by the vendor of this right.

The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the

appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands which can be the subject matter of a caveat. A

[27] Based on the foregoing, I agree with the courts below that in the present case, constructive trust came into existence upon the execution of the deed of sale. This is in line with the common law principle that the deed of sale would entitle the plaintiff to specific performance and this in turn activates the equitable principle that equity looks upon as done that which ought to have been done (see *Walsh v Lonsdale* (1882) 21 Ch D 9, *Attorney-General For Hong Kong v Charles Warwick Reid and Others* [1994] 1 AC 324). B C

If I may add, by definition we may say that constructive trust is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties (see Edmund Davies LJ in *Carl Zeiss Stiftung v Herbert Smith & Co And Another (No 2)* [1969] 2 Ch 276 at p 301). D

In *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380 at p 389 it was observed that, 'A constructive trust is a formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee' per Cardozo J. E

[28] Having considered the facts in this present case and based on the authorities cited above, I am in agreement with the courts below that equity dictates that the defendants must hold the said portion subject to the constructive trust in favour of the plaintiffs pursuant to the term of the deed of sale. F

[29] The next issue to be considered is whether the court could properly, within the provisions of the Code, direct the Registrar of Titles and/or land administrator to cause an endorsement to be entered on the Register of Titles of the constructive trust in favour of the plaintiffs. The courts below did not specify under what provision of the Code the endorsement was to be effected. G H

[30] Under the Code, there is no provision for the registration of the constructive trust as such. Normally, if the beneficiary of a constructive trust wishes to protect his interest, he may do so by entering a private caveat against the land. But, in this case, a private caveat would not be appropriate because of its limited lifespan. The other alternative is for the court to direct the Registrar of Titles to enter the registrar's caveat against the said land to protect the interest of the plaintiffs as beneficiaries under the constructive trust. That I think is the more appropriate order to be made in the present case. Accordingly I would direct that the registrar's caveat be entered against the said land to the effect that I

A the defendants, as registered proprietors, hold 21,000/84,398 undivided shares in the said land as constructive trustees for the plaintiffs, their successors in title or assigns.

CONCLUSION

B

[31] In the result I would dismiss this appeal with costs. The order of the High Court as affirmed by the Court of Appeal is, however, varied to the extent indicated above.

C **[32]** My learned brothers Zulkefli Ahmad Makinudin and James Foong Cheng Yuen FCJJ have read this judgment in draft and have expressed their agreement to the same.

Order accordingly.

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Reported by Ashok Kumar

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